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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

HAROLD DEAN BUTTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No Pet

QUESTION PRESENTED

Whether evidence obtained as a result of monitoring the signals emitted by an electronic beeper installed in an airplane should have been suppressed because the monitoring occurred after the deadline for removal of the beeper established by the warrant authorizing installation of the beeper.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. G1-G2) is unreported. The prior opinion of the en banc court of appeals (Pet. App. A1-A38) is reported at 729 F.2d 1514. The prior opinion of the court of appeals panel (Pet. App. B1-B36) is reported at 710 F.2d 1139. The opinion of the district court (Pet. App. C1-C12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1985. The petition for a writ of certiorari was filed on February 5, 1986, and is therefore out of time under Rule 20.1 of the Rules of this Court. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of importing marijuana into the United States, in violation of 21 U.S.C. 960(a)(1) and 952(a); possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2). Petitioner was sentenced to five years' imprisonment, to be followed by a five-year special parole term.

1. On June 19, 1981, an agent of the United States Customs Service filed an application for a warrant authorizing the installation of an electronic tracking device, commonly known as a "beeper," inside a specified Beechcraft twin-engine airplane. The agent's affidavit set forth allegations showing probable cause to believe that the plane would be used to import marijuana into the United States from Mexico. The magistrate issued the warrant authorizing the installation of the beeper, but the magistrate specified in the warrant that the beeper was to be removed within 30 days after its installation. That night, Customs officers installed the beeper in the interior of the airplane while it was parked at an airport in Seguin, Texas. Pet. App. A3, C1-C2.

The Customs Service subsequently obtained an extension of the original authorization. The extension order stated that the beeper should be removed from the airplane no later than August 19, 1981. The agent who installed the beeper was not on duty on August 19, and the beeper was not removed at that time. Pet. App. A3, C2-C3.

On August 22, 1981, Customs agents detected signals emitted from an airplane beeper. They located the airplane and monitored it by radar on a course that took it over the border into Mexico. The signal later was detected as the airplane flew north from Mexico into the United States.

Two Customs planes sighted and followed the airplane until it landed during the early morning hours of August 23. At that point, Customs officials arrested petitioner, who was piloting the airplane. The agents searched the plane and found marijuana and other evidence aboard. Pet. App. A3, C4-C5.

2. Prior to trial, petitioner moved to suppress the evidence obtained as a result of the monitoring of the beeper. He argued that the monitoring occurred after the beeper should have been removed from the airplane under the terms of the warrant extension, and that the pursuit and seizure of the airplane were the fruits of the unlawfully extended monitoring of the beeper. The district court granted the motion on the ground that "surveillance of the aircraft in this case after August 19, 1981, was unlawful and makes evidence obtained thereby subject to suppression" (Pet. App. C8).

The court of appeals panel affirmed the district court's order (Pet. App. B1-B32), but the full court of appeals granted rehearing and reversed the suppression order by a 10-5 vote (*id.* at A1-A38). Relying on this Court's decision in *United States* v. *Knotts,* 460 U.S. 276 (1983), the majority first concluded (Pet. App. A7) that "monitoring signals from an electronic tracking device that tells officers no more than that a specific aircraft is flying in the public airspace does not violate any reasonable expectation of privacy. Because this is so, no Fourth Amendment violation results from such public detection. The movement of an airplane in the sky, like that of an automobile on a highway, is not something in which a person can claim a reasonable expectation of privacy."

The court next found that the Customs officers' failure to remove the beeper within the time specified in the warrant did not taint the monitoring of the signal so as to require the

application of the exclusionary rule to suppress the marijuana and other evidence found in the plane. The court observed that (Pet. App. A8-A9 (footnotes omitted)) "[t]he purpose of the exclusionary rule is to deter improper police conduct that violates a person's reasonable expectation of privacy under the Fourth Amendment. It does not purport to reach all illegal conduct by officers and is not applicable in the circumstances present here." Neither the installation of the beeper nor the failure to remove the beeper could have influenced petitioner's decision to fly in public airspace, the court found, and the Customs officers' conduct therefore did not have any effect upon petitioner's expectation of privacy. The monitoring of the signal from the beeper "did nothing more than enhance the customs official's legal right to observe the aircraft's public movements. No Fourth Amendment right was infringed" (*id.* at A9 (footnote omitted)). Accordingly, the court held, there was no reason to suppress the evidence discovered in the search of the airplane.

Judge Garwood filed a concurring opinion (Pet. App. A12-A17). In his view, petitioner had no standing to seek suppression of the evidence because "a pilot, having no proprietary interest in the aircraft, [has no legitimate expectation] that [the aircraft's] movements through the *public* airways will not be tracked by an unauthorized device affixed to the interior of the plane" (*id.* at A14 (emphasis in original)).

Judge Goldberg, joined by Judges Politz and Tate, dissented (Pet. App. A17-A27). He asserted that the beeper's presence in the plane after August 19, 1981, violated petitioner's Fourth Amendment rights, and that the evidence obtained by tracking the beeper signal constituted a "fruit" of this Fourth Amendment violation (*id.* at A17-A23). Judge Goldberg also concluded that the district court's suppression order could be upheld as an exercise of its "inherent supervisory power" (*id.* at A23).

Judge Jolly also filed a dissenting opinion, which was joined by Judges Goldberg, Politz, Tate, and Williams (Pet. App. A27-A38). In Judge Jolly's view, the Customs agents' failure to remove the beeper pursuant to the terms of the warrant rendered the initial installation of the beeper unreasonable under the Fourth Amendment (*id.* at A36). Because the seizure of the evidence resulted from what he viewed as a Fourth Amendment violation, Judge Jolly concluded that the evidence should be suppressed (*id.* at A36-A38).

3. Following the reversal of the suppression order, petitioner was tried and convicted on each count in the indictment.[1] The court of appeals affirmed petitioner's convictions on the basis of its previous en banc decision (Pet. App. G1-G2).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

1. Petitioner contends (Pet. 9-11) that suppression of the evidence is required because the Customs officers failed to comply with the terms of the warrant. This claim is meritless.

We agree with petitioner that the Customs officers should have removed the beeper pursuant to the terms of the warrant, but the question whether the officers failed to comply with the terms of the warrant in some respect is not

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[1]Prior to trial, petitioner filed a petition for a writ of certiorari seeking review of the order of the en banc court remanding the case for trial. The government opposed that petition on the ground that it was premature (Pet. App. E3-E4), and this Court denied certiorari (No. 84-111 (Oct. 1, 1984)).

dispositive here.[2] Rather, the issue is whether the officers' conduct resulted in a violation of petitioner's Fourth Amendment rights. Because the monitoring at issue in this case occurred after the expiration of the authority granted by the warrant, the monitoring must be treated as if it were conducted with no warrant at all. This Court's decision in *United States* v. *Knotts*, 460 U.S. 276 (1983), makes clear that even without the authority of a warrant, the monitoring in this case did not violate the Fourth Amendment.[3]

The question in *Knotts* was whether the warrantless use of a beeper to monitor the movements of a car invaded the defendant's legitimate expectation of privacy. The Court held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another" (460 U.S. at 281). It found that the use of a beeper to aid in monitoring those movements did not impinge upon any legitimate expectation of privacy because visual surveillance could

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[2]We note that there is no evidence that the officers deliberately failed to comply with the terms of the warrant. The record indicates only that the agent who installed the warrant was absent from the area on National Guard duty when the authorization expired (Pet. App. C3). As the court of appeals observed (*id.* at A10 n.5), "the presence of the beeper beyond the time limit well could have been due to illness, accident, inadvertence, or bureaucratic bungling."

[3]Petitioner hints (Pet. 10) that this Court should apply its supervisory power to suppress the evidence; some of the dissenting judges in the court of appeals similarly asserted that the evidence could have been suppressed under the district court's "inherent supervisory power" (Pet. App. A23). The court of appeals majority noted that the district court did not base its decision upon its supervisory power and found that "in any event, [the district court] should not have so ruled (*id.* at A9 n.5). Applying the principles set forth in this Court's decision in *United States* v. *Hasting*, 461 U.S. 499, 505-507 (1983), the majority correctly concluded that suppression of the evidence was not warranted on this ground. (Pet. App. A9-A10 n.5; see also *United States* v. *Payner*, 447 U.S. 727 (1980).

have revealed the defendant's movements, and "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case" (*id.* at 282).

The same analysis applies in this case. As the en banc court of appeals concluded (Pet. App. A7), "*Knotts* teaches us * * * that monitoring signals from an electronic tracking device that tells officers no more than that a specific aircraft is flying in the public airspace does not violate any reasonable expectation of privacy. * * * The movement of an airplane in the sky, like that of an automobile on a highway, is not something in which a person can claim a reasonable expectation of privacy." Not only are flying aircraft open to visual surveillance by other aircraft, but, in this age of congested airspace, aircraft movements routinely are tracked by radar for purposes of air traffic control. See *United States* v. *Bruneau*, 594 F.2d 1190, 1196 (8th Cir.), cert. denied, 444 U.S. 847 (1979) (monitoring of beeper to track an airplane does not constitute a search). The Customs officers' monitoring of the beeper thus did not infringe any reasonable expectation of privacy and, accordingly, did not violate the Fourth Amendment.[4]

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[4]Petitioner's reliance (Pet. 14) on *United States* v. *Bailey*, 628 F.2d 938 (6th Cir. 1980), and *United States* v. *Moore*, 562 F.2d 106 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978), is misplaced. In each of those cases, the beeper was located in a private residence at the time of the monitoring and therefore was not used simply to track the defendant's movements in public places. *United States* v. *Sheikh*, 654 F.2d 1057 (5th Cir. 1981), cert. denied, 455 U.S. 991 (1982), another case cited by petitioner, is similarly inapposite—the monitoring of the beeper in that case revealed events occurring in the defendant's motel room.

Petitioner intimates (Pet. 7) that the fact that the Customs pilots lost visual contact with petitioner's plane somehow is relevant here. But this Court held in *United States* v. *Knotts*, 460 U.S. at 285, that the loss of visual contact does not transform the use of a beeper into a violation of

While acknowledging the decision in *Knotts,* petitioner argues (Pet. 3, 12-13) that this Court's decision in *United States* v. *Karo,* No. 83-850 (July 3, 1984), renders *Knotts* inapplicable here. The Court in *Karo* held that "the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment" and therefore is impermissible unless authorized by a warrant (slip op. 8). The beeper in *Karo* had been placed in a can of ether, which was transported to a house. Law enforcement officers then used the beeper signals to ascertain that the ether was present in the house. The monitoring of the beeper constituted a search, the Court held, because it revealed a critical fact about the interior of the premises—the presence of the can of ether—that the Government was "extremely interested in knowing and that it could not have otherwise obtained without a warrant" (*id.* at 9). The Court noted that this fact distinguished *Karo* from *Knotts,* because in *Knotts* "the beeper told the authorities nothing about the interior of *Knotts*' cabin" (*ibid.* (emphasis in original)).

Here, the beeper revealed nothing about the contents of the airplane that petitioner was piloting; the beeper was used only to ascertain the airplane's location. The present case therefore is controlled by *Knotts* rather than *Karo.*[5]

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the Fourth Amendment. The possibility of continuous visual surveillance is sufficient to establish that a defendant could not have any reasonable expectation of privacy with respect to his movements in an automobile or an airplane.

[5]Petitioner argues (Pet. 15-16) that *Knotts* is inapposite, but the passage of the Court's opinion quoted by petitioner shows that *Knotts* applies when a beeper is used only to track a vehicle's movements in public places. The portion of Justice Brennan's concurring opinion quoted by petitioner refers to the Fourth Amendment standard applicable to the *installation* of a beeper; it does not relate to the *monitoring* of a beeper.

Petitioner suggests (Pet. 17-19) that the government has abused its authority to monitor beeper signals. The court of appeals specifically

2. Petitioner also appears to argue (Pet. 12-14) that his Fourth Amendment rights were violated because the beeper was not removed on the date prescribed in the warrant extension. As a threshold matter, petitioner lacks standing to assert this claim because he had no proprietary interest in the airplane and therefore cannot argue that his Fourth Amendment interests were infringed by the presence of the beeper (Pet. App. A14-A15 (Garwood, J., concurring)). Even if petitioner had owned the airplane, however, his claim would be without merit.

The officers' entry into the aircraft to install the beeper did not violate the Fourth Amendment because that action was authorized by a warrant issued upon a showing of probable cause.[6] Petitioner surely had no legitimate expectation of privacy that was violated by the beeper's mere

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observed that no such abuse occurred here. It noted that the present case concerned "a signal device that remained installed for only two days beyond the warrant-permitted period" and "pretermit[ted] any ruling on worst-case situations that may involve persistent, extended, or unlimited violations of a warrant's terms" (Pet. App. A9 n.4).

Finally, petitioner's claim (Pet. 19) that this case somehow relates to the government's ability to monitor conversations or the presence of persons or objects in "home, automobile or aircraft" is plainly wrong. The case relates solely to the monitoring of the movements of an aircraft through public airspace.

[6]Judge Jolly argued in his dissenting opinion that the Customs officers' failure to remove the beeper retroactively invalidated the warrant-authorized installation of the beeper (Pet. App. A35-A36). But the officers' subsequent conduct did not alter the showing of probable cause upon which the warrant was based and did not in any way change the fact that the officers' entry into the airplane was authorized by a warrant. The initial entry therefore did not violate the Fourth Amendment, even if the officers subsequently violated restrictions on the length of the authorized period of monitoring. In this respect, this case is akin to cases in which officers exceed the scope of their authorization under a warrant when executing a search. The courts have held that, absent some gross abuse by the officers, a violation of the scope of the warrant does not retroactively invalidate the warrant altogether. See, *e.g.*, *Waller* v. *Georgia*, 467 U.S. 39, 44 n.3 (1984); *United States* v. *Crozier*,

physical presence in the aircraft after the authorization had expired; at most the beeper's occupation of space in the plane constituted a technical trespass that did not rise to the level of a Fourth Amendment violation. This Court in *Karo* rejected a parallel argument—that a beeper's continuing presence in a can of ether constituted a seizure of the can that implicated the Fourth Amendment. The Court noted that "[a]lthough the can may have contained an unknown and unwanted foreign object, it cannot be said that anyone's possessory interest was interfered with in a meaningful way" (slip op. 6). The Court concluded that "if the presence of a beeper in the can constituted a seizure merely because of its occupation of space, it would follow that the presence of any object, regardless of its nature, would violate the Fourth Amendment" (*id.* at 7). Just as the presence of the beeper in the can in *Karo* did not constitute a Fourth Amendment violation, the continued presence of the beeper in the airplane in this case cannot be said to have violated petitioner's rights.[7]

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777 F.2d 1376, 1381 (9th Cir. 1985); *United States* v. *Heldt*, 668 F.2d 1238, 1259-1260 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982). Thus, the installation of the beeper—concededly lawful and authorized police conduct—is not rendered retroactively unlawful by the violation of another provision of the warrant, particularly where the violation is not flagrant, as the court of appeals found in this case (Pet. App. A9 n.4).

[7]If the agents had attached the beeper to the outside rather than the inside of the airplane, the monitoring that occurred on August 22 and 23 clearly would not have implicated the Fourth Amendment, as even the dissenting judges in the court of appeals acknowledged (Pet. App. A38). There is no reason that the result should be different merely because the agents obtained a warrant authorizing them to install the beeper inside the plane.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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